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Nov 18 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin Culbertson, Circuit Court Judge

Appellate Case No. 2020-001291

Julie Irving,

Plaintiff/Respondent,

v.

Jeanne Poafpybitty, Donald Matthew Rothgeb and Steven Taylor Rothgeb,

Defendants,

of whom Jeanne Poafpybitty, Personal Representative
of the Estate of Donald M. Rothgeb is

Defendant/Appellant.

MOTION TO COMPEL APPELLANT'S COMPLIANCE WITH RULE 262
SOUTH CAROLINA APPELLATE COURT RULES, AND FOR CONSIDERATION
OF RULE 260, SOUTH CAROLINA APPELLATE COURT RULES

Clifford H. Tall, P.A.
Clifford H. Tall, Esq.
SC Bar No.: 5463
4702 Oleander Drive
Myrtle Beach, SC 29577
(843) 497-9777
ctallpa@sc.rr.com
Counsel for Respondent, Julie Burks (formerly
known as Julie Irving)

TO: REESE R. BOYD, III, ESQ. AND BRET H. DAVIS, ESQ. AND THOMAS RODE, ESQ.

YOU WILL PLEASE TAKE NOTICE that at such time and place as is set by the Court, Clifford H. Tall of Clifford H. Tall, P.A, attorney for Respondent, Julie Irving, (now known as Julie Burks) will move before the Court, pursuant to Rule 262 South Carolina Appellate Court Rules, for an Order compelling Appellant to provide proper service of its August 10, 2022 filing of nearly 300 pages of record with this Honorable Court, upon the following as grounds:

1. On or about August 10, 2022, Appellant served and filed copies of nearly 300 pages of Supplemental Record on Appeal of this case. Respondent reports that Appellant has not served her with copies of these filed pages.

2. Rule 262 South Carolina Appellate Court Rules obligates Appellant to serve opposing counsel with copies of records which a party has filed with the Court. Appellant's August 10, 2022 filing of records with this Honorable Court involves, for a second time during Appellant's appellate efforts, Appellant acting outside of her legal obligations to assemble and file a complete Record on Appeal. Corrective judicial and Respondent actions, at considerable expense, have been required, each time, involving two different courts, in response to Appellant's record failings. (Please see Exhibit "A" hereto, disclosing that, not even Appellant's Answer with Counterclaims, designated by both parties, [R. p. 1711, Lines 17-19], and found by the Trial Court to be wasteful [R. p. 0051, Lines 13-14], were assembled by Appellant and made part of the Record on Appeal.)

3. Please see, R. p. 1713, Lines 20-22, where the Circuit Court, in denying a Motion to Dismiss, admonished all, back in 2019, to carefully comply with applicable rules, as this case moves forward. Please see, also, Exhibit "B", attached hereto.

4. While an affidavit could be forwarded, describing Appellant's most recent incomplete

service of filed documents, Respondent, instead, invites review of Appellant's own message to this Court in letter of August 10, 2022. (Exhibit "C" attached hereto.) Appellant declares that a copy of her letter to this Court, was served upon Respondents, "w/o enclosures".

5. This appeal involves Appellant's continuing concerns about, what she claims, are lower Court errors during examination of Appellant's fiduciary actions, while she was in control of a family estate administration, with more than \$1,000,000.00 gross, in beginning inventory value.

6. This case has been a source of substantial stress, and substantial expense, to all involved. Without Appellant's compliance with her filing and service obligations, this time, additional unwarranted and unfair stress is caused to Respondent, who must now speculate as to what it is, involving some 300 pages, which Appellant has forwarded to the Court for its review, but which Appellant has not allowed Respondent to see. Unlike other times in these matters, has Appellant, this time, been reasonable, faithful and complete with her filings?

7. Respondent has previously achieved success for her case, after exercising due diligence, about Appellant's behavior with courts, and records requirements.

WHEREFORE, Respondent hereby moves for an Order Compelling Appellant's document service requirements, so that copies of whatever it is that Appellant filed with the Court on August 10, 2022, shall be also served, by Appellant, upon Respondent. This matches an obligation presented by the Rules to Appellant, as part of Appellant's privilege in continuing to question legal rulings in this matter. Also, given Appellant's repeated and continuing non-compliance with requirements of Appellate Court Rules, Respondent asserts that dismissal of Appellant's appeal in this matter would be appropriate, pursuant to Rule 260, South Carolina Appellate Court Rules.

Regarding Rule 11 of the South Carolina Rules of Civil Procedure, the undersigned hereby certifies that he has communicated to Appellant's counsel, the concerns addressed in this Motion, in an attempt to resolve the issues. Further consultations with Appellant's counsel regarding this Motion, appear to serve no useful purpose.

Respectfully Submitted

s / Clifford H. Tall

Clifford H. Tall

SC Bar #5463

Clifford H. Tall, P.A.

4702 Oleander Drive

Myrtle Beach, SC 29577

(843) 497-9777

Attorney for Respondent-Plaintiff, Julie
Burks (formerly known as Julie Irving)

Dated: November 18, 2022

Exhibit "A"

THE STATE OF SOUTH CAROLINA
In the Circuit Court

APPEAL FROM HORRY COUNTY
Probate Court

Carroll D. Padgett, Jr., Chief Associate Probate Judge

Case No. 2018-CP-26-06416

In the matter of the Estate of Donald M. Rothgeb

Julie Irving..... Respondent-Plaintiff,

vs.

Jeanne Poafybitty, Personal Representative of the
Estate of Donald M. Rothgeb.....Appellant-Defendant,

and

Jeanne Poafybitty, Donald Matthew Rothgeb and
Steven Taylor Rothgeb.....Defendants.

ORDER GRANTING SUPPLEMENT TO RECORD ON APPEAL

This matter came before the Court on July 16, 2019, through Motions of Respondent, Julie Irving. Clifford H. Tall, Esq. appeared on behalf of Respondent, Julie Irving. Reese R. Boyd, III, Esq. appeared on behalf of Appellant, Jeanne Poafpybitty, Personal Representative of the Estate of Donald M. Rothgeb. The case involves an appeal from two Orders of the Horry County Probate Court, and the hearing addressed, specifically, the assembly, service and filing of the case's Record on Appeal.

The parties in this matter both filed, on January 25, 2019, their respective Designations of Matters on Appeal. Through these designations, both parties informed the Court, and each other, of those documents, associated with the trial of this case, which each wished to have included for the record that would be available to the Appellate Court for its review.

According to §62-1-308(f) of the Horry County Probate Code, Appellant has obligation of assembling, filing and serving the Record on Appeal, to include documents which had been designated by both parties in their January 25, 2019 pleadings.

Following the March 2019 filing and service by Appellant of a Record on Appeal, Respondent identified some 340 pages of documents which had not been included in the subject Record. Pursuant to Rule 212 (b) of the South Carolina Appellate Court Rules, Respondent moved to supplement the Record. Among missing pages was Appellant's lawsuit Answer, with Counterclaims, a document which both parties had designated as a pleading to become part of the Appellate record. Also missing were exhibits originally attached to a Request for Admissions, served by Respondent during trial preparation, which both parties had also designated to become part of the Record on Appeal.

At hearing, the parties presented substantial argument regarding some 240 pages of what was referred to as "footnote exhibits". These were pages delivered with draft Order, and cover

letter, to the Trial Court on October 12, 2018. Following this delivery, the Trial Court issued an Order on November 7, 2019.

During hearing on July 16, 2019, Appellant's counsel informed the Court of his client's consent to supplementing the March 2019 Record on Appeal with some 87 pages listed in Respondent's Motion for Supplement, but not the footnote exhibits, described above. Appellant's objections to the footnote exhibits involve how the Court Order of November 7, 2018 was issued. Throughout the Order, there appear some fifty numbered and lettered references, but the Order, itself, includes no language which links these numbered and lettered references to any specific exhibit described in, or attached to, the Order. Appellant argued, therefore, that the subject footnote exhibits are not part of the November 7, 2019 Order.

Respondent offered, at hearing, that the subject footnote exhibits were delivered to the Trial Court on October 12, 2018, and that, recently, the Horry County Probate Court has forwarded to the Circuit Court, copies of these same footnote exhibits, which are on file with the Probate Court case. Respondent informs that these footnote exhibits contain excerpts from trial transcripts, cited authorities, trial exhibits and other documents referenced during proceedings in the Horry County Probate Court.

Respondent further argued that Appellant, herself, has designated, as part of the Record on Appeal, Respondent's October 12, 2018 cover letter which delivered a draft order and the subject footnote exhibits to the Trial Judge. Respondent asserts that the October 12, 2018 delivery of documents to the Trial Court is part of the case history, and that, especially in light of Appellant's designation of Respondent's October 12, 2018 cover letter for the appellate record, this Court should include attachments to this same October 12, 2018 cover letter, as also being part of the case record.

The Court hereby rules to allow record supplement of some 87 missing pages which both parties now consent to. These pages, described in Respondent's Motion to Supplement, are attached as Exhibit "A" hereto. The Court further rules to allow record supplement of some 240 pages of footnote exhibits which were delivered to the Trial Judge for his consideration, prior to issuance of his November 7, 2018 Order. These pages currently exist in the Horry County Probate Court file, and represent a history of case proceedings. These pages, attached to correspondence from the Honorable Kathy G. Ward, Horry County Probate Judge, dated May 28, 2019, Exhibit "B" hereto, will now supplement the Appellate record. Both parties, if they desire, may argue about the substance and meaning of the delivered footnote exhibits, as the parties further advocate about the Trial Court's November 7, 2018 Order, and what relevance these footnote exhibits may have. Nothing in this Order addresses the meaning or relevance of these pages, which shall now supplement the March 2019 record filing.

At Hearing, the parties also addressed Respondent's Motion to Dismiss the Appeal, pursuant to Rule 260 (a) of the South Carolina Appellate Court Rules. Respondent expressed concern about Appellant not meeting her statutory appeal obligations, and what Respondent's Motion describes as Appellant's record shortcomings. Respondent's Amended Motion also expressed concern about Appellant's motivations in filing an incomplete Record on Appeal that did not include numerous designated documents, including Appellant's own trial Answer and important exhibits to a discovery request, which both parties had designated to become part of the record. At present, the Court declines to grant Respondent's Motion to Dismiss. The Court nonetheless instructs all parties to carefully comply with all applicable rules, as this case moves forward.

In disposition of one additional item, the Court roster indicates that there was an outstanding Motion to Alter and/or Amend some prior Order in this case. Counsel for both parties confirm that no such Motion to Alter and/or Amend was outstanding, and the Court, therefore, issues no ruling associated with what appears to have been a clerical error.

AND SO IT IS ORDERED.

Dated: 8-12-19



Larry B. Hyman, Circuit Court Judge

Exhibit "B"

The South Carolina Court of Appeals

Julie Irving, Respondent,

v.

Jeanne Poafpybitty, Donald Matthew Rothgeb, and
Steven Taylor Rothgeb, Defendants,

Of whom Jeanne Poafpybitty, Personal Representative of
the Estate of Donald M. Rothgeb, is the Appellant.

Appellate Case No. 2020-001291

The Honorable Benjamin H. Culbertson
Horry County
Trial Court Case No. 2018CP2606416

ORDER

Respondent filed a "Motion for Supplement to Record on Appeal, so that the Currently Deficient Record Includes All Matters Designated in the Record on Appeal." No return was filed. The motion is Granted. Respondent shall file and serve the supplemental record on appeal within 30 days from the date of this order.

FOR THE COURT

BY *V. Claire Allen*
CLERK

Columbia, South Carolina

FILED
Feb 09 2022

cc:
Clifford Heywood Tall, Esquire

Reese R. Boyd, III, Esquire
Bret Harlan Davis, Esquire
Thomas J. Rode, Esquire

Exhibit "C"

DAVIS & BOYD, LLC

Attorneys & Counselors at Law

BRET H. DAVIS, JD*, CPA
JULIE A. OLIVER, JD, LL.M.

* Licensed in SC and NC

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REESE R. BOYD, III, JD*
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August 10, 2022

SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

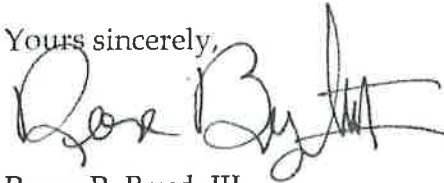
Re: Julie Irving v. Jeanne Poafpybitty
Appellate Case Number: 2020-001291
Our File Number: 016.017

Dear Sir/Madam:

Enclosed please find 6 bound copies of the Supplemental Record on Appeal which is being submitted in accordance with the Court's correspondence dated August 2, 2022.

Thank you for the Court's consideration in this matter.

Yours sincerely,



Reese R. Boyd, III

RRB/cmp
Encs.

cc: Clifford H. Tall, Esq. w/o enclosures
Mr. Matthew Rothgeb w/o enclosures
Mr. Steven Rothgeb w/o enclosures

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SC Court of Appeals

CERTIFICATE OF SERVICE

I, Clifford H. Tall, attorney for Respondent-Plaintiff, Julie Burks (formerly known as Julie Irving), do hereby certify that I have served Appellant, and other Defendants in this case in this action with a copy of the Motion to Compel Appellant's Compliance with Rule 262 South Carolina Appellate Court Rules, and for Consideration of Rule 260, South Carolina Appellate Court Rules, by email, to the following addresses:

Reese R. Boyd, III, Esq.
reese@davisboydlaw.com

Bret H. Davis, Esq.
bdavis@davisboydlaw.com

Thomas Rode, Esq.
thomas@tktlawyers.com

Donald Matthew Rothgeb
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Steven Taylor Rothgeb
strothgeb77@gmail.com

s / Clifford H. Tall
Clifford H. Tall

Dated: November 18, 2022